Filed 1/26/10 In re D.H. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re D.H. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. M.H., Defendant and Appellant.	C061325 (Super. Ct. Nos. JD225051, JD226969)

Mother M.H. appeals from the order of the juvenile court that terminated her parental rights and selected adoption as the permanent plan for minors D.H. and T.M. (Welf. & Inst. Code, § 366.26, § 395; undesignated section references will be to this code.)

The mother argues that the referee's failure sua sponte to recuse himself based on extrajudicial circumstances violated her right to due process. Alternately, she claims there is insufficient evidence of D.H.'s adoptability (§ 366.26, subd.

(c)(1)), and the juvenile court erred in failing to apply the "benefit" exception to termination of her parental rights (§ 366.26, subd. (c)(1)(B)(i)). We affirm the order.

FACTS AND PROCEEDINGS

In October 2006, the Sacramento County Department of Health and Human Services (DHHS) filed a petition alleging that D.H., born in November 2001 (case number JD225051), and his younger sibling V.B., born in April 2004, came within the jurisdiction of the juvenile court because their mother failed to protect them. (§ 300, subd. (b).) The circumstance prompting DHHS intervention was the mother's attack on her boyfriend and his car while V.B. was present. In the course of the investigation, the mother said D.H. might have witnessed the fatal shooting of V.B.'s father in their home; he stopped talking after this, other than to hold his hand in the shape of a gun and say "you're dead." The mother admitted being in a series of violent relationships.

The juvenile court took jurisdiction. In February 2007, it ordered an in-home dependency based on the mother's moderate progress, negative drug tests, and active participation in services. In August 2007, the juvenile court terminated jurisdiction, based on the mother providing a stable home environment in which the minors were thriving and her successful completion of all services.

In February 2008, the DHHS filed a new petition on behalf of D.H. in case number JD225051, and a petition on behalf of

T.M. (newly born in January 2008) in case number JD226969. These alleged that the minors came within the jurisdiction of the juvenile court on various grounds (§ 300, subds. (a) [risk of physical harm], (b) [failure to protect], (f) [another child's death from abuse], (j) [abuse of sibling]) because V.B. had died two days earlier of massive internal injuries as the result of blunt force trauma to the abdomen and thorax while in the care of the mother and T.M.'s father, for which neither was willing or able to provide an explanation. The juvenile court detained the minors.

In the jurisdiction/disposition report, the social worker noted that the mother was having only one hour of supervised visitation with the minors per week (pursuant to the juvenile court's orders at the detention hearing). She behaved appropriately during the visitations. She was staying with maternal relatives rather than the father of T.M., with whom she had ended her relationship.

The social worker had also interviewed D.H. She found him engaging and well-mannered. He missed his mother, with whom he enjoyed playing games. Neither minor had any fractures or other signs of physical abuse. They were both in foster homes, where they were considered good children.

The report recommended denial of reunification services to the mother based on the severe physical abuse and resulting death of their half-sibling. (§ 361.5, subds. (b)(4) & (b)(6).) While it did not appear the mother was directly involved in the infliction of the injuries on V.B., the report concluded that

she was at the least negligent in failing to be aware of the ongoing physical abuse of V.B. Even though the mother had a significant bond with "the minors" [*sic*; we assume the report meant only D.H. and not the infant that the mother had scarcely seen since shortly after the child's birth], reunification would not serve their best interests because of her history of poor relationships and failure to protect their half-sibling.

After a contested hearing, the juvenile court sustained the allegations and denied reunification services for the mother. It set a hearing on the permanent plan of adoption and placed D.H. with his maternal aunt and T.M. with her paternal great-grandmother (the aunt being unable to care for an infant), with the mother to have supervised monthly visitations.

The November 2008 selection and implementation report noted the mother interacted with minors appropriately during her visitations. The mother also maintained daily telephone contact with D.H. Both minors were healthy and on target developmentally, except for D.H.'s speech impairment. However, he was receiving speech therapy in school, and was able to make himself understood. D.H. was not having any academic problems. With respect to his emotional health, D.H. had experienced an anxiety attack in August as a reaction to a scheduled appointment with a therapist. D.H. had experienced being a witness of the death of V.B.'s father and V.B., and had been exposed to domestic violence consistently over the course of the mother's series of relationships. He struggled with his emotions, having temper tantrums on a weekly basis and defiant

behavior because he missed his mother and wanted to be with her. He would need continuing therapy to help deal with his memories of T.M.'s father. However, overall he was happy and friendly, and was a typical seven-year-old. In the one sibling visit that was able to take place, D.H. "very much" enjoyed seeing his sister.

The report noted the recent identification of a potential adoptive home, involving a childless couple willing to adopt both minors. The couple was aware of the background of the minors and was committed to helping them deal with the resulting issues, and was in favor of helping the minors maintain their biological ties. The social worker was working on transitioning the minors to this proposed adoptive home. A couple of days after the filing of the report, the DHHS placed T.M. in the proposed adoptive home. It placed D.H. in the home in early December after a series of transition visits.

The report concluded the minors were adoptable. They were young and healthy except for D.H.'s severe speech impediment, which was not a disability that had proven a barrier to adoption in the social worker's experience. D.H.'s emotional problems also did not rise to a level that would impede adoption. The report stated that they should be adopted as a sibling set, which would not present any obstacles because "many families . . . are open to adopting sibling sets, especially in their age range."

D.H.'s therapist had treated him from June 2008 until his placement in the home of the prospective adoptive parents. She

testified at the hearing that she had tried to give him coping mechanisms and skills to help deal with the hard time he was having in adjusting to the absence of his mother, the death of one sister, and the absence of the other. D.H. derived an "incredible" benefit from visits with his mother. Unlike a typical dependent minor, he did not have any negative thoughts about his mother. In the therapist's opinion, D.H. would have an extremely negative reaction to a cut-off of contact with his mother. This could include outbursts of extreme anger, a psychotic break, and the potential for suicide, hallucinations, and major depression. Therefore, D.H. would not stabilize in an adoptive home if all contact with the mother were cut off.

The aunt testified that when in her custody, D.H. was very happy to have visits from his mother. When the frequency of the visits decreased after the dispositional hearing, he began to have tantrums about missing her. She expressed the opinion that since her family was mostly a matriarchy, she did not think that D.H. would feel comfortable with a male couple such as the prospective adoptive parents. She also attested to the close bond D.H. felt for T.M.

The DHHS submitted the matter on the report and the social worker's testimony updating it. The social worker maintained frequent contact with the prospective adoptive parents. They indicated that D.H. had adjusted positively to the home, was happy, and was adjusting to his new school with some tutoring. The social worker thought a male couple was a particularly apt placement for D.H. because he was strongly bonded with his

mother, and would not be forced to accept someone else in that role. The prospective parents had not reported any behavioral problems with him. They understood his need for continued therapy to cope with the negative things that had occurred in his life. Their overall impression of him was "a happy. . . , friendly, easy-going kid that everybody loves." If there were going to be problems with the placement, the social worker would have expected them to have arisen by now. While D.H. might not yet view them as parents, he was happy with them as the people caring for him. He had made friends and was becoming an integrated part of the home. With respect to contacts with the mother and her family, the prospective parents were willing to do whatever was necessary for D.H.'s best interests. The cultures of the two families were quite different, including the high degree of contact the biological family seemed to expect. If these could be worked out, continued family contact would be beneficial for D.H. If not, continued contact with the family would be detrimental. Even in the latter case, the benefit of adoption outweighed the benefit of continued contact with his mother and her family.

The social worker described a visit from the mother and other maternal relatives about 10 days earlier. When told that his mother was coming, D.H. became withdrawn and lethargic. He sat passively on his mother's lap, then at the end of the visit went to the lap of one of the prospective adoptive parents and cuddled with him. D.H. did not openly display any emotions other than lethargy. The social worker believed that after

being very much in denial about not being able to return to his mother, this visit represented his acceptance of the situation. On the following day, D.H. told the prospective parents that he felt "two hundred percent" and there were no adverse effects from seeing his mother.

The social worker discounted the opinion of the therapist. She felt that the therapist did not give much weight to the facts giving rise to the dependency, and did not take into account the inability of the aunt to continue to foster D.H. Contrary to the therapist, the social worker believed that D.H. had demonstrated a significant ability to cope with everything that had happened to him. She also observed that D.H. had been stable with his aunt and prospective parents despite extremely limited contact with his mother.

To the extent there was any focus on T.M. at the hearing, the social worker noted that she was an "easy, happy baby." T.M. was already looking to the prospective parents as a source of love and comfort.

In finding clear and convincing evidence that the minors were adoptable in its February 2009 ruling, the juvenile court acknowledged the strong bond between D.H. and his mother. However, D.H. needed permanency to remedy the losses he had experienced and meet his needs. There was not going to be any chance that he would be reunited with his mother, given the conduct that led to the dependency. This would leave him in a nebulous situation in the absence of a plan of adoption. The juvenile court found that the report of the social worker, who

was experienced in adoptions, was entitled to great weight. On the other hand, the therapist did not have experience with adoptions and did not take anything other than the feelings of her client into account. The therapist's opinion that D.H. would not be able to stabilize without parental contact was contrary to the actual evidence of his overall adjustment to his placements.

DISCUSSION

I

Recusal

The referee who returned V.B. to her mother was the same referee who presided over almost every hearing in the present proceedings. Relying on newspaper articles dehors the record that apparently appeared while the present dependencies were pending, the mother asserts that they purportedly contained severe criticism from many sources of the decision to return V.B. to her home. The mother contends it consequently violated her right to due process when the referee did not recuse himself on his own motion from making any further rulings in the face of this apparent censure in the press.

The source of judicial power is the faith of the citizenry in the ability to have a fair hearing. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 253.) Thus, a basic element of due process is a fair trial before a fair tribunal. (*Caperton v. A. T. Massey Coal* Co. (2009) 556 U.S. ___ [173 L.Ed.2d 1208, 1217] (*Caperton*).)

A judge's actual bias is a violation of federal due process. (*People v. Freeman* (Jan. 21, 2010, S150984) ___ Cal.4th ___, fn. 4 [2010 Cal. LEXIS 112] (*Freeman*) [remarks of judge on record showed actual bias in a "pattern of conduct . . . that rendered a fair trial impossible"]; *People v. Vasquez* (2006) 39 Cal.4th 47, 69, fn.12; *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 461-463; *Hall v. Harker* (1999) 69 Cal.App.4th 836, 841-843; *Catchpole v. Brannon*, *supra*, 36 Cal.App.4th at p. 262.) However, even absent actual bias, federal due process forbids a judge from hearing a case where an interest poses a sufficient *risk* of actual bias or prejudgment under a realistic evaluation of human psychology. (*Caperton*, *supra*, 556 U.S. at p. ___ [173 L.Ed.2d at p. 1222].) Absent this intolerably high risk of an actual bias, federal due process is otherwise not implicated and the issue of a mere *appearance* of bias is one purely of state law. (*Freeman*, *supra*, at p. ___, fn. 4 [disapproving cases that have suggested otherwise].)

An *appearance* of bias is established where the facts could lead a reasonable person to doubt whether the court could be impartial. (*People v. Chatman* (2006) 38 Cal.4th 344, 365 [facts that judge's daughter was a crime victim and judge had brief exchange when victim's father approached judge do not create a reasonable appearance of bias]; *People v. Brown* (1993) 6 Cal.4th 322, 328-329, 336-337 [fact that trial judge made ex parte contacts with counsel and investigator, telling them their efforts to contact jurors were a waste of time and money because

irrelevant to hearing on modification of death verdict, does not establish reasonable appearance of bias].)

The problem with the mother's attempt to obtain a reversal based on a reasonable appearance of bias is her failure to raise the issue in any manner in the juvenile court beyond her attorney's passing reference in closing argument to the case being "high profile" and subject to "more press than we would like." The mother contends the referee was obligated to recuse himself as a matter of his duty under the canons of judicial ethics, and asserts without any apposite authority that the catchall provision for a judge's disqualification for cause (Code Civ. Proc., § 170.1, subd. (a)(6)) "does not require a motion to trigger." She cites only a case involving judicial *misconduct* for a failure to recuse sua sponte (*Kloepfer v. Comm. on Judicial Performance* (1989) 49 Cal.3d 826, 859, fn. 20), which does not have any bearing on whether a *party* can forfeit the claim of a judge's appearance of bias.

To the contrary, a party may forfeit the statutory right to a peremptory challenge or challenge for cause absent a timely motion, and forfeit review on denial of the motion absent a timely writ; while the issue of a denial of federal due process may nonetheless be viable in a subsequent appeal, it is not cognizable unless the party raised the issue of recusal in the trial court in the first instance. (*Freeman*, *supra*, ___ Cal.4th at p. ___ [2010 Cal. LEXIS 112]; *People v. Chatman*, *supra*, 38 Cal.4th at p. 363.) Having failed to do this, the mother has forfeited the issue on appeal (even if we were to assume

arguendo that the facts here established such a violation of due process) as a matter of fairness to the DHHS and the juvenile court. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265 & fn.22.)

Even though we have discretion to reach a constitutional issue regardless of forfeiture on such undisputed facts as appear *in the record* (*In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323), we are disinclined to exercise it because the mother fails to point to any facts *in the record* on which we could resolve the issue. Counsel's remark in closing argument establishes neither the tenor nor the extent of the "press" such that we could determine the existence of a reasonable appearance of bias. The mother improperly sought to bring these facts before us by means of a motion for judicial notice, which we denied: judicial notice could establish only the existence of articles in the local newspaper, not the truth of the contents. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-865.)

In short, the mother has forfeited the issue, and the record on appeal is inadequate to resolve it. We therefore decline to reach the merits.

II

Adoptability

The mother contends there is "abundant evidence" that D.H. was not generally adoptable, which would also render T.M. not adoptable because she was part of a sibling group that the social worker (and others) believed was important not to sever.

(Unlike the DHHS, we do not believe this argument is asserting the "sibling bond" exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(v)).) She relies on D.H.'s speech impediment, the emotional trauma he experienced, his tantrums and strong emotions about his mother, his race, and his status in a sibling group. She claims this makes D.H. akin to foster children that the Legislature has identified as facing barriers to adoption (citing a provision for financial aid to prospective adoptive parents of such children (§ 16120, subd. (a)(1)). She then challenges the sufficiency of the evidence to establish the suitability of the prospective adoptive parents, and faults the social worker's report for failing to comply with various provisions of section 366.21, subdivision (i) for assessing the adoptive placement.

While the mother conceded the minors' adoptability in the trial court, this does not forfeit the legal issue of the sufficiency of the evidence to support the juvenile court's finding. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1560-1561.) It *does*, however, forfeit her contentions regarding inadequate compliance with section 366.21. (*Id.* at p. 1560; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.)

Before a court may select adoption as the permanent plan, it must find by clear and convincing evidence that a minor is likely to be adopted after terminating parental rights. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; § 366.26, subd. (c)(1).) Contrary to the mother's assertion, the fact that the burden of proof is clear and convincing evidence does not affect

our assessment of substantial evidence (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154) any more than where proof beyond a reasonable doubt is required. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)

The facts we have related above are more than substantial to sustain the finding. The prospective family was well aware of D.H.'s speech deficit and emotional problems, neither of which the social worker believed was severe enough to pose any impediment to adoption. (*In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1154 [behavioral problems not severe and did not dissuade prospective adoptive homes, thus did not prevent finding of adoptability].) The mother does not identify any evidence to the contrary regarding the speech impediment (which did not prevent D.H. from making himself understood and which apparently had not interfered with his academic progress). She relies on the evidence of his earlier anxiety attack and tantrums over his separation from his mother while in his aunt's home, without identifying any evidence that these had persisted over the passage of time until the permanency planning hearing, during which his family contacts had diminished. Significantly, the visit shortly before the hearing showed that D.H. was able to have a limited contact with the mother without adverse emotional consequences. As for the opinion of the therapist regarding the detrimental effect of adoption on the emotional stability of D.H., we have related the juvenile court's accurate articulation of its shortcomings, to which we add only the observation that

the opinion also rested on the false premise that adoption would necessarily cut off *all* contact with the mother.

The mother also fails to identify any evidence that the prospective parents are the *only* ones interested in adopting the sibling unit (in fact, the report was to the contrary, as noted above). Rather, the prospective parents were simply the *first* to express interest in the minors. The interest of a specific prospective placement in adopting a minor is sufficient evidence of that minor's adoptability within a reasonable time, even if eventually by some other person. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1650; *In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1154.)

All of this demonstrates why trial counsel did not believe a challenge to D.H.'s adoptability was worth the effort. As the mother's nascent appellate claim regarding T.M.'s adoptability relies on the sufficiency of the evidence of D.H.'s, it must fall as well.

The invocation of *In re Asia L.* (2003) 107 Cal.App.4th 498 (*Asia L.*) does not aid the mother. The holdings of other cases evaluating evidentiary sufficiency have little if any value in a court's assessment of the sufficiency of the evidence before it to support a finding. (*People v. Rundle* (2008) 43 Cal.4th 76, 137-138.) Furthermore, the minors in *Asia L.* had significant emotional and behavioral problems requiring constant supervision, and the social worker had not been able to find any prospective adoptive home. (107 Cal.App.4th at pp. 510-512.)

As for the suitability of the prospective adoptive home, this is relevant *only* where its existence is the basis for a finding that a minor is adoptable *despite* a legal impediment to adoption. (*In re Scott M.* (1993) 13 Cal.App.4th 839, 844.) As we have upheld the court's finding that the minors are generally adoptable, we do not need to address the mother's contentions regarding the suitability of the prospective adoptive parents.

III

Regular Visitation Exception

The mother contends the juvenile court erred in failing to give effect to the exception to a termination of parental rights and placement for adoption where "The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) As she expressly limits her argument to the juvenile court's refusal to apply the exception to D.H., we do not address T.M. separately.

"[I]t is virtually impossible for a parent who was denied reunification services at the very beginning of the case" to assert the benefit exception successfully, as the Legislature intended "'relatively automatic'" termination of parental rights in those circumstances. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255; also see *id.* at p. 1255, fn.5 [noting this "may be the most unsuccessfully litigated issue in the history of law"].) There must be a compelling showing (§ 366.26, subd. (c)(1)(B)) that terminating parental rights would divest a minor of a "substantial, positive emotional attachment," resulting in

great harm to the child that overcomes the preference for adoption. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) This requires balancing the effect of the tenuous circumstances that will result from a failure to sever parental ties against the benefits of security and belonging that a new family could confer. (*Ibid.*) We review the court's ruling on the issue for an abuse of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

The mother notes she maintained as much contact with D.H. as she could under the limited visitation that the juvenile court allowed after the jurisdictional/dispositional hearing. While personal visitation was infrequent, she spoke with D.H. frequently on the phone. We therefore disagree with the DHHS that her contacts with *D.H.* were too insignificant to *establish* a significant and positive bond with him (although this would be true of T.M.). The contacts were sufficient to *continue* the parent-child bond between them. (See *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

The mother primarily reiterates the undisputed fact that D.H. derived great emotional benefit from the significant bond with her as a parent, and experienced great emotional harm from the separation. The question, however, is whether this significant bond and demonstrated harm justify a disregard for the legislative preference of adoption.

The mother relies on the therapist's opinion as evidence of the great harm adoption would cause. We will not reiterate the

previous criticisms of the therapist's opinion. The juvenile court did not abuse its discretion in rejecting it.

As the juvenile court correctly pointed out, regardless of the degree of emotional comfort D.H. derived from his ties with the mother, her history of relationships had repeatedly exposed D.H. to violence despite her best intentions (even after her previous successful completion of reunification services), for which reason he would never be able to reunify with her. A failure to sever the parental tie would leave him in a nebulous situation, unable to return to her but unable to derive the benefits of a permanent placement elsewhere. The evidence also showed that the emotional harm he suffered from the separation was abating over time. The juvenile court was entitled to conclude that maintaining the status quo short of adoption with a guardianship or "planned permanent living arrangement," as the mother suggests, was not feasible. The evidence at the hearing showed the potential adoptive parents were already apprehensive of the overwhelming demands for contact with the minor that the mother and her family were placing on them, and the social worker was concerned whether the conflicting "cultures" of the families could resolve amicably. If the court were to cede to the adoptive home sufficient control over D.H. to allow the potential adoptive parents to manage the terms of the family contacts, there would not be any effective distinction from their outright adoption of him with their expressed desire that he maintain contact with his birth family (which provides him with the benefits of a permanent home and minimizes the harm

that is already diminishing). In short, we cannot find any abuse of discretion in failing to apply this exception to adoption.

DISPOSITION

The order of the juvenile court is affirmed.

HULL, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.